VERONICA LEE HA LING & ORS A

v.

MAXISEGAR SDN BHD

FEDERAL COURT, PUTRAJAYA B
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIFF PCA
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 02(i)-27-2009(W)]
7 AUGUST 2009 C

CIVIL PROCEDURE: *Pleadings - Issue not pleaded - Breach of housing development contract - Appeal against reduction of damages for late delivery - Whether manifestly unjust for appellants to succeed in an appeal upon a point not pleaded before court of first instance* D

LAND LAW: *Housing developers - Damages for late delivery - Appeal against reduction of - Pleadings - Whether manifestly unjust for appellants to succeed in an appeal upon a point not pleaded before court of first instance* E

CONTRACT: *Housing development contract - Breach - Appeal against reduction of damages for late delivery - Pleadings - Whether manifestly unjust for appellants to succeed in an appeal upon a point not pleaded before court of first instance* F

The appellants, house-buyers, entered into separate agreements with the respondent, a licensed developer, to purchase apartments built by it. The appellants contended that there had not been delivery in accordance with the terms of the agreements and claimed compensation for late delivery. The High Court agreed G with the appellants and ordered the respondent to pay liquidated and ascertained damages for late delivery. The Court of Appeal varied the High Court's order by reducing the sum awarded. The appellants thus filed the present appeal, contending that the respondent breached cl. 23 of the agreements. Clause 23 H prescribed the precise manner in which the respondent was to deliver vacant possession to the appellants. It was common ground that no certificate by the vendor's architect certifying the matters in cl. 23 was ever produced before the primary judge. The only document ever produced was an application for a certificate of I fitness made by the respondent's architect to the relevant local

A authority. The respondent, however, pointed out that it had not taken the obvious step of producing the architect's certificate because the frontal attack at first instance was not on non-compliance with cl. 23 but that no application had been made to the relevant local authority for a certificate of fitness. Accordingly, B the respondent was being asked to argue its case on a basis never put by the appellants to the High Court in the first place. Had the appellants' case been that cl. 23 had not been complied with, then the respondent would have produced the appropriate certificate.

C

Held (dismissing the appeal with costs)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

D **(1)** Having perused the cause papers placed before the High Court, this court was inclined to agree with the respondent. Nowhere in the affidavits filed in support of their originating summons did the appellants assert a violation of cl. 23. In particular, there was no averment that the respondent's E architect's certificate had not been served on the appellants. The thrust of the appellants' case appeared to be that no application was ever made to the relevant local authority for a certificate of fitness, and it was in answer to that assertion that the respondent produced the relevant application. It is F settled law that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. The matter is really one of natural justice. It would be manifestly unjust for the appellants to succeed before this court on a point not taken before the High G Court. Thus, although leave was granted to the appellants, it was unnecessary to answer the question posed. It had become academic by virtue of the way in which the case was placed before the High Court. In the very special circumstances of this case, the Court of Appeal's variation of H the High Court's order had not produced an injustice to the appellants because of the way they put their case at first instance. (paras 7, 8 & 9)

I

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu, yang merupakan pembeli rumah, membuat perjanjian-perjanjian berbeza dengan responden, satu pembangun berlesen, untuk membeli pangsapuri yang dibina olehnya. Perayu-perayu mendakwa bahawa tiada penghantaran mengikut terma-terma perjanjian-perjanjian dan menuntut pampasan bagi penghantaran lewat. Mahkamah Tinggi bersetuju dengan perayu-perayu dan mengarahkan responden untuk membayar ganti rugi jumlah tertentu dan yang telah dipastikan bagi penghantaran lewat. Mahkamah Rayuan mengubahkan perintah Mahkamah Tinggi dengan mengurangkan jumlah yang diberi. Perayu-perayu, oleh itu, memfail rayuan semasa, dan menghujahkan bahawa responden telah melanggar kl. 23 perjanjian-perjanjian itu. Klausa 23 memperuntukkan cara yang tepat bagaimana responden sepatutnya menyerah milikan kosong kepada perayu-perayu. Ia merupakan titik persamaan bahawa tiada sijil oleh arkitek penjual yang memperakui perkara-perkara dalam kl. 23 yang dikemukakan di hadapan hakim primer. Dokumen tunggal yang dikemukakan adalah suatu permohonan untuk satu sijil kelayakan yang dibuat oleh arkitek responden kepada pihak berkuasa tempatan yang relevan. Responden, walau bagaimanapun, mendakwa bahawa ia tidak mengambil langkah yang patut untuk mengemukakan sijil arkitek kerana serangan berhadap di peringkat pertama bukan atas ketidakpatuhan dengan kl. 23 tetapi bahawa tidak ada permohonan yang dibuat kepada pihak berkuasa tempatan yang relevan untuk mendapat suatu sijil kelayakan. Oleh yang demikian, responden telah diminta untuk menghujah kesnya atas sesuatu dasar yang tidak pernah dikemukakan oleh perayu-perayu ke hadapan Mahkamah Tinggi pada mula-mulanya. Jika kes perayu-perayu adalah bahawa kl. 23 tidak dipatuhi, responden akan tentu mengemukakan sijil yang berpatutan.

Diputuskan (menolak rayuan dengan kos)
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Setelah meneliti kertas-kertas guaman yang dikemukakan di hadapan Mahkamah Tinggi, mahkamah ini cenderung kepada bersetuju dengan responden. Tiada mana-mana dalam afidavit-afidavit yang difail untuk menyokong saman permulaan mereka suatu penyataan oleh perayu-perayu mengenai pelanggaran kl. 23. Terutamanya, tiada apa-apa pengataan bahawa sijil

A arkitek responden tidak disampaikan kepada perayu-perayu. Teras kes perayu-perayu nampaknya merupakan bahawa tidak ada permohonan yang telah dibuat kepada pihak berkuasa tempatan yang relevan untuk mendapat satu sijil kelayakan, dan ia sebagai jawapan kepada penyataan itu bahawa
B responden mengemukakan permohonan yang relevan. Ia merupakan undang-undang mantap bahawa seorang litigan tidak seharusnya dibenarkan berjaya dalam sesuatu rayuan atas suatu perkara yang tidak dibangkitkan atau diplid di hadapan mahkamah permulaan. Perkara ini sebenarnya mengenai
C keadilan asasi. Ia sungguh tidak adil bagi perayu-perayu untuk berjaya di hadapan mahkamah ini atas suatu perkara yang tidak dihujah di hadapan Mahkamah Tinggi. Oleh itu, walaupun kebenaran telah diberi kepada perayu-perayu, ia tidak perlu untuk menjawab soalan yang ditanya. Ia telah
D dijadikan akademik disebabkan cara bagaimana kes ini diletakkan di hadapan Mahkamah Tinggi. Dalam keadaan-keadaan yang sungguh khas kes ini, pengubahan perintah Mahkamah Tinggi oleh Mahkamah Rayuan tidak menghasilkan sesuatu ketidakadilan kepada perayu-perayu disebabkan cara
E bagaimana mereka mengemukakan kes mereka pada mula-mulanya.

Case(s) referred to:

Hoe Cheong Products Co Ltd v. Cargill Hongkong Ltd [1995] 1 WLR 404 ***(refd)***

F

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

SEA Housing Corpn Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

G

For the appellant - Dato' Harpal Singh Grewal (Harwinder Kaur with him); M/s AJ Ariffin, Yeo & Harpal

For the respondent - Ricky Tan Seng Cheong; M/s Ricky Tan & Co

H *[Appeal from Court of Appeal, Civil Appeal No: W-02-125-2005]*

[Editor's note: For the Court of Appeal judgment, please see Maxisegar Sdn Bhd v. Veronica Lee Ha Ling & Ors [2009] 6 CLJ 247.]

Reported by Suresh Nathan

I

JUDGMENT

Gopal Sri Ram FCJ:

[1] The appellants are house-buyers. The respondent is a licensed developer. The appellants entered into separate agreements with the respondent to purchase apartments built by it. The respondent took the position that it had delivered the apartments to the appellants in accordance with the agreements it had with them. The appellants disputed this. They took the position that there had not been delivery in accordance with the terms of the agreement. They claimed compensation for late delivery. The High Court agreed with the appellants and ordered the respondent to pay liquidated and ascertained damages for late delivery. The Court of Appeal varied the High Court's order by reducing the sum awarded. It did this on the basis that time should stop running against the respondent as of the date of issuance of the temporary certificate of occupation. As it happens, no such certificate was ever produced by the respondent at the hearing before the High Court. The appellants then obtained leave of this court and brought the appeal herein before us.

[2] The gist of the appellant's case before us is that the respondent breached cl. 23 of the agreement in question. That clause reads:

> Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and water and electricity supply are ready for connection to the said Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel.

[3] Now, cl. 23 is part of a statute based contract. In this country, the relationship between a house-buyer and a licensed developer is governed by the Housing Developers legislation. Its object is to protect house-buyers against developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it. As Suffian LP said in *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why rule 12 was enacted and in particular paragraphs (o) and (r) thereof. With respect we do not agree with Mr. Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as clause 32 in this agreement … In our judgment such details as are inserted into a written agreement must be details consistent, not inconsistent with the Act and rules.

[4] Similarly, in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618, the Court of Appeal said of such a contract as in the present case:

> The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract.

[5] The case for the appellants before us is this. Clause 23 prescribes the precise manner in which the respondent was to deliver vacant possession to them. It is common ground that no certificate by the vendor's architect certifying the matters in cl. 23 was ever produced before the primary judge. The only document ever produced was an application for a certificate of fitness made by the respondent's architect to the relevant local authority. Hence his lordship was entirely correct in holding that there had been late delivery and in awarding compensation for it. The Court of Appeal was accordingly wrong in interfering with the decision of the High Court.

[6] We were puzzled why, in the face of such a simple complaint by the appellants the respondent had not taken the rather obvious step of producing the architect's certificate. However, counsel for the respondent pointed out that this had not been done because the frontal attack at first instance was not on the non-compliance

with cl. 23 but that no application had been made to the relevant local authority for a certificate of fitness. Accordingly, the respondent was being asked to argue its case on a basis never put by the appellants to the High Court in the first place. Had the appellants' case been that cl. 23 had not been complied with, then the respondent would have produced the appropriate certificate.

[7] Having perused the cause papers placed before the High Court, we are inclined to agree with learned counsel for the respondent. Nowhere in the affidavits filed in support of their originating summons did the appellants assert a violation of cl. 23. In particular, there was no averment that the respondent's architect's certificate had not been served on the appellants. The thrust of the appellants' case appears to be that no application was ever made to the relevant local authority for a certificate of fitness. And it is in answer to that assertion that the respondent produced the relevant application.

[8] It is settled law that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. The matter is really one of natural justice. The several authorities on the subject were collected and discussed in the judgment of Jemuri Serjan SCJ in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239. We would also refer to *Hoe Cheong Products Co Ltd v. Cargill Hongkong Ltd* [1995] 1 WLR 404 which sufficiently demonstrates the point.

[9] It would be manifestly unjust for the appellants to succeed before us on a point not taken before the High Court. Thus, although leave was granted to the appellants, we find it unnecessary to answer the question posed. It has become academic by virtue of the way in which the case was placed before the High Court. We would add that in the very special circumstances of this case, the Court of Appeal's variation of the High Court's order has not produced an injustice to the appellants because of the way they put their case at first instance.

[10] The appeal was accordingly dismissed with costs fixed at RM8,000. The deposit in court was ordered to be paid out to the respondent to account of fixed costs.